Supreme Court, U. S.
FILED
APR 19 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77—1066

EUGENE ENSLIN,

Petitioner

v.

J. W. BEAN, SUPERINTENDENT,
NEW HANOVER COUNTY PRISON UNIT,
NORTH CAROLINA DEPARTMENT OF CORRECTION,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RUFUS L. EDMISTEN
Attorney General of North Carolina

ANDREW A. VANORE, JR.
Senior Deputy Attorney General

EDWIN M. SPEAS, JR.
Special Deputy Attorney General

Counsel for the Respondent

North Carolina Dept. of Justice
P. O. Box 629
Raleigh, North Carolina 27602
Telephone (919) 733-7387

DI CESARE - Printing - Washington, D.C. 20006 - (202) 331-8101

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the Eastern District of North Carolina are unreported, but are set forth in the Appendix to the Petition filed herein.

JURISDICTION

Petitioner erroneously cites 28 U.S.C. §1257(3) as the source of this Court's jurisdiction in this matter. We assume he intended to invoke jurisdiction pursuant to U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in relying upon the summary affirmance doctrine in deciding this case?

2. Did Petitioner's conviction under N.C.G.S. 14-177 deprive him of his constitutional rights of liberty and privacy?

3. Is N.C.G.S. 14-177 unconstitutionally vague?

4. Do the prohibitions of N.C.G.S. 14-177 reflect an embodiment of the establishment of religion?

5. Did Petitioner's conviction under N.C.G.S. 14-177 deprive him of equal protection of the laws?

STATEMENT OF THE CASE

On September 23, 1974, the petitioner, Eugene Enslin, was tried in the Superior Court of Onslow County, North Carolina upon an indictment charging him with the "abominable and detestable crime against nature." N.C.G.S. 14-177. Upon a finding of guilty of the charge and judgment of the trial court that the petitioner be confined in the State's prisons for a term of one year, petitioner appealed to the North Carolina Court of Appeals. That Court, in an opinion reported at 25 N.C. App. 662, 214 S.E. 2d 318 (1975), found "no error." The Supreme Court of North Carolina dismissed petitioner's subsequent appeal for lack of a substantial constitutional question and denied his petition for writ of certiorari. This decision is reported at 288 N.C. 245, 217 S.E. 2d 669 (1975). A petition for certiorari was then filed in this Court. That petition was denied. *Enslin v. North Carolina*, 425 U.S. 903, *reh. den.* 425 U.S. 985 (1976).

On September 7, 1976, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of North Carolina contending, on a number of grounds, that N.C.G.S. 14-177 was unconstitutional. Respondent answered the petition and moved to dismiss. On January 3, 1977, the District Court entered an order dismissing the petition. Upon appeal, the District Court's opinion was affirmed by the United States Court of Appeals for the Fourth Circuit. Petitioner then filed this petition for writ of certiorari.

STATEMENT OF THE FACTS

Petitioner, Eugene Enslin, owned and operated a combination massage parlor, pornographic bookstore, bar and sporting goods store in Jacksonville, North Carolina. (Rp 14)[1] On June 7, 1974, Herbert C. Morgan, a seventeen year[2] old member of the United States Marine Corps stationed at nearby Camp Lejeune, visited the bookstore at the request of Detective Sam Hudson of the Jacksonville Police Department. Morgan's purpose in visiting the bookstore was to give petitioner an opportunity to solicit Morgan's participation in an act of fellatio. Marked money was given to Morgan by Detective Hudson should the petitioner request money in payment for his services. (Rpp 5, 6 and 12) Upon entering the bookstore, Morgan asked the clerk if he could speak with the petitioner. The clerk replied that petitioner was out of the store but would soon be back. Two

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[1]The symbol "R" refers to the record on appeal filed in connection with petitioner's State Court appeals.

[2]At page 4 of the petition it is stated that the age of consent in North Carolina is seventeen. Respondent is not aware of any statutory or case law in the State of North Carolina establishing the age of consent for acts of sodomy or other related acts at seventeen.

or three minutes later, petitioner approached Morgan and stated, "I hear you are looking for me." Morgan asked if they could speak in private. Morgan and petitioner then went outside the bookstore and Morgan advised petitioner that he was just out of "bootcamp" and was looking for "a little excitement." Petitioner advised Morgan that the girls in the massage parlor did not provide that "excitement," but that he could if Morgan would first get a massage. (Rpp 6 and 7)

Morgan advised petitioner that he had to go somewhere but would be back in a few minutes. Morgan left the bookstore and went to talk with Detective Hudson who was waiting in a nearby field. Morgan advised Hudson of his conversation with the petitioner. Hudson then asked Morgan to return to the bookstore. (Rp 7)

Morgan returned to the bookstore and discovered that petitioner was not there. Morgan then went into the adjoining massage parlor and asked for petitioner. A woman in the massage parlor advised Morgan that petitioner was out to supper but would be back soon. Morgan asked if he could have a massage while he was waiting. The woman replied that he could, but upon determining that Morgan was less than eighteen years of age, refused to give him a massage. Some fifteen to twenty minutes later, petitioner came into the massage parlor and Morgan informed him that he could not get a massage because of his age. Petitioner then informed Morgan that he could still give him the "excitement" that he was looking for without the purchase of a massage. Morgan and petitioner went into the bookstore. Petitioner carried him through an area containing "peep shows" and then through a door into the back room of the bookstore. The room contained a sink, a bed, a bureau and a movie projector and screen. Petitioner turned on the projector, which was showing a pornographic movie, and asked Morgan to get undressed and lie on the bed. Petitioner then undressed, got on the bed with Morgan and performed an act of fellatio upon Morgan. (Rpp 7 and 8)

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Did Not Err in Applying the Summary Affirmance Doctrine.

Lower courts are not free to disregard the summary decisions of this Court. Indeed, lower courts '"are bound by summary decisions . . . until such time as the court informs them that they are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Petitioner argues that the Circuit Court erred in applying the summary affirmance doctrine to this case because of certain statements appearing in *Carey v. International Population Services*, 431 U.S. 678 (1977). The statement relied upon appears in a footnote to the majority opinion. That statement is:

> "We observe that the Court has not definitely answered the difficult question whether and to what extent the Constitution prohibits the state statutes regulating such behavior [private consensual sexual behavior] among adults." *Id.* at 694, note 17.

Can this statement be viewed as an instruction to the lower courts that the summary affirmance in *Doe v. Commonwealth Attorney*, 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd* 425 U.S. 901 (1976) could be disregarded? We think not. The statement relied on by petitioner is ambiguous. It can be read as an observation that the Constitution may extend to protect private consensual homosexual acts. Such a reading would carry the right of privacy far beyond the family and the home and represent a significant expansion of the right of privacy. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) for example. On the otherhand, this statement can be viewed as an observation about the uncertainty of the degree to which the right of privacy extends to protect sexual acts between *heterosexuals*, married or unmarried. Such a reading is more reasonable than the broad reading proposed by

petitioner in that it only involves a clarification of the right of privacy and not an expansion of that right.

Put bluntly, we do not believe that an ambiguous footnote forms any basis upon which a lower Federal Court may act in disregard of the summary affirmance doctrine. Accordingly, we submit that the Circuit Court correctly applied the summary affirmance doctrine in affirming the denial of petitioner's writ of habeas corpus.

II. This Case Does Not Involve the Question of the Constitutionality of State Regulation of Homosexual Acts Between Consenting Adults in the Privacy of the Home.

According to petitioner, this case squarely presents the issue of the constitutionality of State prohibition against adults engaging in consensual homosexual acts in the privacy of the home. An examination of the facts undercuts this simple characterization.

This case concerns the criminal prosecution of an adult for the blatent and open pandering and solicitation of an act of fellatio with a seventeen year old,[3] who had earlier been denied a massage by petitioner's own employees because of his age. The act of fellatio did not occur in a home or motel room; it occurred in the back room of a pornographic bookstore apparently during the regular hours of operation of the store. Thus, the real issue presented by this case is whether a State may constitutionally use its criminal statutes to prohibit the pandering of homosexual favors to minors. Undoubtedly, the states have that authority.

[3]It is, of course, beyond question that the scope of permissible State regulation is broader as to minors than as to adults. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Carey v. International Population Services, supra.*

III. The Issues Raised by the Petitioner Have Previously Been Decided by the Courts.

Throughout the long history of this case, petitioner has repeatedly raised four issues. These are:

(1) Whether the application of crime against nature statutes to homosexual acts between consenting adults is violative of the constitutional rights of liberty and privacy?

(2) Whether N.C.G.S. 14-177 is unconstitutionally vague?

(3) Whether the application of crime against nature statutes to homosexual acts between consenting adults violates the Equal Protection Clause?

(4) Whether crime against nature statutes embody the establishment of religion in violation of the Establishment Clause of the First Amendment?

Assuming for the moment that the facts of this case do present the issues described by the petitioner, it is clear that these issues have previously been determined adversely to the petitioner, by this Court and other courts.

On at least three separate occasions this Court has summarily disposed of arguments that the application of crime against nature statutes to homosexual acts between consenting adults violates the constitutional rights of liberty and privacy. See *Doe v. Commonwealth Attorney, supra; Canfield v. State*, 506 P.2d 987 (Okla. 1973) *app. dism.* 414 U.S. 991 (1973), *reh. den.* 414 U.S. 1138 (1974); *Pruett v. State*, 463 S.W. 2d 191 (Tex. 1970), *app. dism.* 402 U.S. 902, *reh. den.* 403 U.S. 912 (1971).

On two earlier occasions this Court has specifically held that crime against nature statutes virtually identical to North Carolina's are not unconstitutionally vague. See *Wainwright v. Stone*, 414 U.S. 21 (1973) and *Rose v. Locke*, 423 U.S. 48 (1975).

Petitioner's argument that N.C.G.S. 14-177 denies to him and all other homosexuals equal protection of the law because it singles out homosexuals for State regulation and prohibits their enjoyment of sex is without merit. The entire premise of this argument is without support. N.C.G.S. 14-177 is not limited to acts of homosexuals. "The crime against nature is sexual intercourse contrary to the order of nature, and in this jurisdiction embraces the offenses of sodomy, beastiality and buggery, as those offenses were known at common law." *State v. Harward*, 264 N.C. 746, 142 S.E. 2d 691 (1965). See also *State v. O'Keefe*, 263 N.C. 53, 138 S.E. 2d 767 (1964), *cert. den.* 380 U.S. 985 (1965). N.C.G.S. 14-177 then applies to acts between men, between women, between a man and a woman, and between a man and a beast. The statute makes no distinctions between crimes against nature committed by heterosexuals, homosexuals or bisexuals.

Petitioner argues that N.C.G.S. 14-177 is in violation of the Establishment Clause of the First Amendment of the Constitution for the reason that it imposes a rule of conduct on citizens for basically religious objectives. This Court has previously dismissed an appeal in which this issue was present because of the lack of a substantial constitutional question. See *Connor v. Arkansas*, 490 S.W. 2d 114 (Ark. 1973), *app. dism.* 414 U.S. 991, *reh. den.* 414 U.S. 1138 (1973). See also *McGowan v. Maryland*, 366 U.S. 420 (1961).

IV. The Issues Raised By The Petitioner Are For The Legislatures Not For The Courts.

The primary argument advanced by the petitioner throughout this protracted litigation is that State regulation of homosexual acts between consenting adults violates the constitutional rights to liberty and privacy. Petitioner's arguments in this regard are bottomed upon reasoning identical to the philosophy of John Stuart Mill as expressed in his volume *On Liberty*. Indeed, in his brief in the North Carolina Court of Appeals petitioner acknowledged his reliance upon the philosophy of Mill and discusses that philosophy at length.

Professor Frank Strong in an article entitled "Bicentennial Benchmarks" in the *North Carolina Law Review* (55 N.C.L. Rev. 1 (1976)) describes the relationship between previous decisions of this Court and the philosophy of Mill as follows:

> "Perceptive scholars have sensed that in the background of the reasoning in *Roe* [*Roe v. Wade*, 410 U.S. 113 (1973)] lies the philosophy of John Stuart Mill as expressed in his volume *On Liberty*. In this work . . . , Mill posited that 'one very simple principle' governs the dealings of society and government with the individual. This principle is that 'that the individual is sovereign,' his 'independence absolute,' save when 'harm to others' is involved." *Id.* at 99.

Professor Strong describes the inevitable result of the adoption of such a philosophy by society as follows:

> "... Mill's insistence on this one absolute principle as a guide to individual-societal relationships induces an insatiable demand for liberty that knows scarcely any bounds, certainly not those of tradition, moderation, prudence, common sense, decency, civility, or any higher law. It also breaks with the tradition of the Western world with its complete denigration of authority which preforce, must be viewed illegitimate. It erodes and finally destroys any sense of perspective..." *Id.* at 99.

Professor Strong sees the adoption of such a position by the courts as placing courts at odds with the Constitution itself. He says:

> "The view that the Court can properly act to take the leadership in developing societal consensus, even to the point of redirecting it, places the Court in a position of supremacy at odds with traditional conceptions. According such creativity to the Court in the exercise of constitutional review would implicate a complete break with inherited constitutional design. It would mean the endowment of the Court with policy making authority undreamed by, and wholly alien to the principles of, those who turn to the courts for the effective vindication of written constitutional limitations." *Id.* at 101.

Mr. Chief Justice Warren has stated that there is a "right of the nation and of the states to maintain a decent society." *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964). See also *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 59 (1973). The determination of "decency" is for the citizens of the State through their elected representatives in the Legislature. It is not for this Court or any other court.

CONCLUSION

Petitioner's conviction has been reviewed by every court in the State and Federal system. All of his arguments have been rejected. We believe that this Court, upon an examination of this brief, will again be convinced of the lack of merit in the petitioner's position and deny review.

This the 19th day of April, 1978.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

ANDREW A. VANORE, JR.
Senior Deputy Attorney General

EDWIN M. SPEAS, JR.
Special Deputy Attorney General

NORTH CAROLINA DEPT. OF JUSTICE
P. O. Box 629
Raleigh, North Carolina 27602
Telephone (919) 733-7387

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused copies of the foregoing BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to be deposited in the United States mail, postage prepaid, and addressed as follows:

Mr. Joel M. Gora
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Mr. E. Carrington Boggan
Lambda Legal Defense Education
Fund, Inc.
5 East 57th Street
New York, New York 10022

Mr. Norman B. Smith
Mr. Michael B. Curtis
Smith, Patterson, Follin, Curtis
& James
704 Southeastern Building
Greensboro, North Carolina 27401

This 19th day of April, 1978.

Edwin M. Speas, Jr.
Special Deputy Attorney General